EXTERNAL RELATIONS OF THE EPPO: COOPERATION CHALLENGES WITH CROATIA AND EUROPOL

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This paper focuses on the role of Europol in the implementation of the EPPO Regulation and analyses the potential challenges for law enforcement in Croatia. For this purpose, a comparative method is used and future ideas for the practical implementation of the Regulation within Europol are presented. Part of the paper focuses on explaining the legal background of the work of the EPPO and its relation to Europol and Croatia. It then explains the challenges and opportunities for Europol after the EPPO becomes fully operational, including Europol analytical capacities, the possibilities for information exchange (SIENA), and Europol innovation capacities. In conclusion, the paper analyses concrete challenges and offers solutions for different problems that may arise in future relations between Europol and the EPPO. An outline is also given of the priorities of the Presidency of Croatia of the Council of the European Union in the first half of 2020 related to financial investigation.

Keywords: EPPO, Europol, Croatia, financial investigation, SIENA, VAT fraud, cryptocurrency

1. INTRODUCTION

In order to answer the question of what kind of external relations are foreseen by the EPPO and what the cooperation challenges are for the future cooperation of Croatia and Europol for its implementation, it is primarily important to analyse the scope of work of the EPPO Regulation. The next step is to answer the question of *when* international cooperation is necessary for proper proceedings. The third question is *what* instruments might be "offered" by a particular international organisation to help in the implementation. Finally, it is necessary to gain an overview at the national level and to foresee the predictable consequences that might influence future implementation. In its essence,

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the implementation of Council Regulation (EU) 2017/1939 of 12 October 2017 (hereinafter: EPPO Regulation) is limited "to criminal offences affecting the financial interests of the Union in accordance with this Regulation. The tasks of the EPPO should thus be to investigate, prosecute and bring to judgment the perpetrators of offences against the Union's financial interests under Directive (EU) 2017/1371 of the European Parliament and of the Council".[1] Any extension of the competence that includes an international dimension requires the unanimous decision of the European Council. For the first time, use is made of the term "shared competence" between the EPPO and national authorities in combating crimes that affect financial interests. In this paper, emphasis is given to the role of Europol in the implementation of the EPPO Regulation, cooperation between law enforcement bodies (police/customs and prosecutors), and some future challenges that may influence the whole process.

2. SCOPE OF THE EPPO REGULATION

Point 11 of the Preamble of the EPPO Regulation defines its scope of work (to investigate, prosecute and bring to judgment perpetrators of offences prescribed in Directive (EU) 2017/1371) (hereinafter: Directive 2017/1371).[2]

Article 2 of Directive 2017/1371 defines the "Union's financial interests" as "all revenues, expenditure and assets covered by, acquired through, or due to … the Union budget [and] the budgets of the Union institutions, bodies offices and agencies established pursuant to the Treaties or budget directly or indirectly managed or monitored by them".

A legal person in the same article is defined as "an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations".

Regarding revenue arising from VAT own resources, Directive 2017/1371 applies only to serious offences against the common VAT system. Serious offences are, according to Article 2 of Directive 2017/1371, "intentional acts or omissions defined in point (d) of Article 3(2)[3] … connected with the territory

[1] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1, Preamble (11).

[2] Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L198/29.

[3] Any act of omission committed in cross-border fraudulent schemes in relation to: a) the use or presentation of false, incorrect of incomplete VAT-related statements or documents, which has as its effect the diminution of the resources of the Union budget: b) non- disclosure of VAT-related information in violation of a specific obligation, with the same effect; or c) the

of two or more Member States of the Union and involve a total damage of at least EUR 10 000 000".

Article 3 of Directive 2017/1371 defines fraud affecting the Union's financial interests, dividing it in respect of non-procurement-related expenditure, procurement-related expenditure, revenue other than revenue arising from VAT own resources, and revenue arising from VAT own resources. Non-procurement-related expenditure is defined as an act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf, non-disclosure of information in violation of a specific obligation with the same effect and use of such funds for purposes other than those for which they were granted.

Procurement-related expenditure can be defined in a similar way to non-procurement-related expenditure: it might be caused by an act or omission in order to make an unlawful gain by causing a loss to the Union's financial interests.

Revenue other than revenue arising from VAT own resources is defined as an act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf, the non-disclosure of information in violation of a specific obligation, with the same effect; or the misapplication of a legally obtained benefit, with the same effect.

Revenue arising from VAT own resources are similarly defined as an act or omission committed in cross-border fraudulent schemes in relation to the use or presentation of false, incorrect or incomplete VAT-related statements or documents which has as an effect the diminution of the resources of the Union budget, non-disclosure of VAT-related information and the presentation of correct VAT-related statements for the purpose of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

Article 4 of Directive 2017/1371 prescribes the obligation of Member States to "take necessary measures to ensure that money laundering described in Art. 1(3) of Directive (EU) 2015/849[4] involving property derived from the criminal

presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

[4] Money laundering, if committed intentionally, is regarded as: a) the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action; b) the concealment or disguise of the

offences covered by this Directive constitute a criminal offence". Further, Member States shall "take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences".[5]

Directive 2017/1371 also prescribes that misappropriation, when committed intentionally, constitutes a criminal offence. The term "misappropriation" is related to the action of a public official "who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests". It is important to mention that a "public official" might be a "Union official" (an official or other servant under contract by the EU but also one seconded to the EU) and "national official" who includes "any person holding an executive, administrative or judicial office at national, regional or local level". The definition also includes persons "assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries". To conclude, it is a very wide definition that includes the local level as well as those persons who are engaged in third countries.

Inciting and aiding and abetting the commission of criminal offences against the EU budget (fraud, corruption, or serious cross-border VAT fraud) should be punishable as criminal offences by the Member States.

Each Member State is obliged to "take necessary measures to establish its jurisdiction" if the criminal offence is committed in whole or in part within its territory or if the offender is one of its nationals. A Member State may inform the European Commission and extend its jurisdiction if the offender is a habitual resident in its territory, if the criminal offence is committed for the benefit of a legal person established in its territory, or if the offender is one of its officials who acts in his or her official duty.

true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is derived from criminal activity or from an act of participation in such an activity; (c) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such an activity; (d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions referred to in points (a), (b) and (c). Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73. Croatia is in line with this definition. See Article 265 of the Criminal Code of the Republic of Croatia.

[5] Croatia is in line with this definition. See Articles 252, 253 , 293 and 294 of the Criminal Code (consolidated version).

Article 10 of Directive 2017/1371 invites Member States to take necessary measures to enable the freezing and confiscation of instrumentalities and proceeds of criminal offences in accordance with Directive 2014/42/EU of the European Parliament and of the Council. Following the entry into force of the EPPO Regulation, Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders have entered into force[6] and should be implemented from 19 December 2020. It covers freezing and confiscation orders issued without a final conviction. Even if this kind of order (without a final conviction) does not exist in the legal system of a Member State, that Member State should be able to recognise and execute such orders issued by another Member State. Freezing orders and confiscation orders in civil or administrative matters are not within the scope of that Regulation.[7]

Article 3 of Regulation 2018/1805 defines criminal offences that must be executed without verification of double criminality. In paragraph 1(8) of the same Article, all criminal offences referred to in Directive 2017/1371 are specifically mentioned. It is to be expected that until 22 November 2020 when the EPPO Regulation should be implemented, Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation will improve the exchange of orders.

3. THE EPPO IN RELATION TO EUROPOL

Unlike Directive 2017/1371 that does not stipulate cooperation with Europol,[8] Article 102 of the EPPO Regulation clearly defines cooperation with Europol. Moreover, the EPPO is invited to establish cooperation with Europol in the form of working arrangements. Further, the EPPO "shall be able to obtain … any information held by Europol, concerning any offence within its competence". It is also interesting that the EPPO may ask Europol to provide analytical support for a specific investigation.

This raises many questions for the future daily work of Europol. Europol already has standardised "working arrangements" which cover, *inter alia*, the field of work, data exchange and (personal) data protection rules. What "Europol data" might be exchanged? Article 18 of Regulation (EU) 2016/794 (hereinafter: Europol Regulation)[9] answers that question: Personal data may be

[6] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1.

[7] For more about the EU legal framework on confiscation, see Europol Criminal Assets Bureau, <https://polis.osce.org/file/21391/download?token=Bp2pf0I_> accessed 24 April 2020.

[8] Article 15 of Directive 2017/1371 relates to cooperation.

[9] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016

processed only for the purposes of: cross-checking aimed at identifying connections or other relevant links between information related to persons *who are suspected of having committed or taken part* in a criminal offence in respect of which Europol is competent, or who *have been convicted* of such an offence; persons regarding whom there are *factual indications or reasonable grounds to believe* that they will commit criminal offences in respect of which Europol is competent; for the analyses of a strategic or thematic nature; for operational analyses and for facilitating the exchange of information between Member States, Europol, other Union bodies, third countries and international organisations.

Operational analyses provided by Europol are subject to strict rules and should be performed by means of operational analysis projects. Within every operational analysis project, the Executive Director shall, in accordance with Article 18 of the Europol Regulation, "define the specific purpose, categories of personal data and categories of data subjects, participants, duration of storage and conditions for access, transfer and use of the data concerned, and shall inform the Management Board and the EDPS[10] thereof". Personal data may only be collected and processed *for the purpose of the specified operational analysis project*. Where it becomes apparent that personal data may be relevant for another operational analysis project, further processing of those personal data shall only be permitted insofar as such further processing *is necessary* and *proportionate* and the personal data are compatible with the provisions that apply to the other analysis project. Those who provide information to Europol (Member States, Union bodies, third countries and international organisations) may indicate any restriction on access to the information provided or the use to be made thereof.

The principles of cooperation between Eurojust, OLAF and Europol are prescribed in Article 21 of the Europol Regulation. Both Eurojust and OLAF, within their respective mandates, have indirect access on the basis of a hit/no hit system to information described in Article 18(2) of the Europol Regulation. In the case of a hit, Europol will ask the "provider" of the information whether it is willing to share information with Eurojust and OLAF. If the same principles apply for cooperation with EPPO, the period from the positive crossmatch until Europol approval for the use of information might take more time. This particular problem will apply especially if the data provider is a country that does not implement the EPPO Regulation.[11]

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on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135/53.

[10] European Data Protection Supervisor.

[11] UK, Ireland, Denmark, Sweden, Poland, Hungary - situation in April 2019.

Another potential problem is what will happen if countries put the H2[12] Handling Code on the information provided? This information is not automatically cross-matched and will not be available to the EPPO.

However, it is of essential importance to make the SIENA[13] channel available to the EPPO in order to exchange, transfer and receive data in a standardised format and to use Europol capacities in fast data exchange. If a working arrangement between the EPPO and Europol is concluded, the EPPO, like Eurojust, can actively participate in data exchange via SIENA. SIENA is available to Eurojust and predominantly to the law enforcement community that will, *mutatis mutandis*, be responsible in different countries for the practical execution of the requests of judicial authorities.

What are Europol analytical capacities for support at the moment? Particular interest focuses on analytical projects (hereinafter: AP),[14] MTIC,[15] APATE,[16] Smoke,[17] Asset Recovery,[18] and Sustrans.[19]

Two specialists and two analysts are working on the activities of AP MTIC, two specialists and three analysts are working on AP SMOKE, and one specialist and one analyst are engaged in APATE.[20] In all three APs in 2018, a total of 68 operations were supported, and 716 contributions were received related to MTIC 716, a total of 1,286 for SMOKE, and 4,020 for APATE. Seven operational meetings were organised in MTIC, 25 in AP SMOKE and 16 in AP APATE. Europol supported arrests in 63 MTIC cases, 185 in SMOKE cases, and 75 in APATE cases.

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[12] This information must not be disseminated without the permission of the provider.

[13] SIENA – Secure Information Exchange Network Application. A Europol data exchange system that enables secure and swift transmission of sensitive and restricted data.

[14] The purpose of the Operational Analysis Project is to support competent authorities of the Member States as well as Union bodies, third countries and international organisations which are associated to the Operational Analysis Project in preventing and combating offences committed with the intention to defraud under false and deceitful pretexts resulting in the voluntary but unlawful transfer of values or goods or an undue advantage to the fraudsters.

[15] Activities of criminal organisations involved in Missing Trader Intra Community (MTIC) fraud as well as other related criminal activities uncovered in the course of investigations into these groups.

[16] Preventing and combating offences committed with the intention to defraud under false and deceitful pretexts resulting in the voluntary but unlawful transfer of values or goods or an undue advantage to the fraudsters.

[17] Organised crime networks engaged in excise fraud in the Member States as well as any associated criminal activities within Europol's mandate uncovered in the course of the investigation into these criminal networks.

[18] Tracing and identification of criminal proceeds linked to the mandated crime areas of Europol.

[19] Support of the competent authorities in money-laundering activities, in particular through the analysis of information contained in financial intelligence reports.

[20] Situation in March 2019.

Future cooperation with the EPPO is an opportunity for Europol to strengthen its position as a criminal information hub and as a centre for expertise in financial investigation. If, in each Member State that has ratified the EPPO Regulation, there are at least two delegated prosecutors who will lead the investigation, and if Europol treats the request from investigators as high priority cases, it will be necessary to increase the number of specialists and analysts in each AP. Roughly, if each prosecutor on average opens just one case a year, that means 44 new cases.

During 2019 and later in 2020, Europol made a significant organisational change, introducing a special "sector" dealing with financial crime. As of the second half of 2019, Europol has been implementing a principle based on High Value Targets (on high profile criminals, measured by specific criteria) with the possibility of arranging an Operational Task Force that should have many more resources available for concrete criminal investigation. There are some internal reorganisation challenges that are being tackled which should improve the analytical capacities of Europol. Whether these will be sufficient still remains an open question.

The next important point for Europol is to consider opening a new AP to deal with all kinds of corruption described in the EPPO Regulation and Directive 2017/1371. At the moment, an AP on Sport Corruption has begun to operate.

Another challenge is how to ensure cooperation between the EPPO and Europol. A possible solution is to install a Liaison Office at the EPPO in Luxembourg.

In order to avoid duplication and enable swift data transfer, technical solutions are being developed by Europol that might help in accurate, swift, and fast data exchange. Europol can also enable the transfer of huge amounts of data which might be a challenge in future common financial investigations.

4. CONCLUSION

The EPPO is structured both at the central and national level. Its central level (the European Chief Prosecutor, his or her two Deputies, 22 European Prosecutors – one per participating Member State, two of whom as Deputies of the European Chief Prosecutor and the Administrative Director) supervises investigations and prosecutions at the national level. This directly influences national criminal investigation that has so far been under the sovereignty of the States. There are many open questions about such a "balance of powers", including cooperation with the EPPO in investigations, etc.

Cooperation with third parties or international bodies like Europol might, at a later stage, affect procedural rights and the free movement of evidence in EPPO cases and will directly have an impact on cross-border data sharing.

Future relations between Europol and EPPO will be based on working arrangements. Questions still to be answered concern the kind of analytical support and the kind of information that might be provided by Europol. Further questions are the length of time it takes to provide information, whether or not the data owner uses the H2 code, and what resources Europol has for the analytical support of concrete criminal investigations.

If we take into account the wider concept, it is clear that within the next financial period of 2021-2027 more financial support should be foreseen for the full implementation of the EPPO Regulation. How are these means going to be disseminated? They will most probably be disseminated via ISF – Police. There is still discussion on the Multiannual Financial Framework for Law Enforcement and, with Brexit, it is very questionable how much will be provided for EPPO implementation.

The laundering of proceeds from criminal activities in the EU is estimated annually to amount to EUR 110 billion ($124.19 billion).[21] The EPPO Regulation is not implemented in all EU countries, since there are some countries that do not apply it and at the same time are "accused" by the European Parliament of being tax heavens for money laundering.[22]

What is the current situation in Croatia?

From 1 January 2011 to 28 February 2019, permanently confiscated proceeds of crime, after a final judgment, were recorded to a total amount of HRK 173.6 million[23] in cash, 11 real estate properties, seven vehicles, one construction plot, precious metals valued at HRK 950,000, cell phones, IT equipment, household appliances and a cannabis breeding laboratory.[24]

If we compare this with overall criminal gains, the results could be much better.

What is the position of Croatia as a country holding the Presidency of the EU Council in the first half of 2020?

[21] "European Parliament report accuses seven countries, including Cyprus, of acting as tax havens". *Ekathimerini.com* (26 March 2019 2019) <http://www.ekathimerini.com/238910/article/ekathimerini/news/european-parliament-report-accuses-seven-countries-including-cyprus-of-acting-as-tax-havens> accessed 24 April 2020.

[22] Luxembourg, Cyprus, Ireland, Malta, Hungary, Belgium and the Netherlands.

The document is the result of a year's work by the parliament's committee on financial crime and tax evasion. The report has now been adopted by the whole assembly, boosting its political weight, though it remains non-binding.

[23] EUR 1 is approximately HRK 7.4.

[24] V. Mo, "Pogledajte koliko je država kriminalcima oduzela novca, nekretnina, vozila, nakita, satova…" *Tportal.hr* (27 March 2019) <https://www.tportal.hr/vijesti/clanak/drzava-presudama-oduzela-173-6-milijuna-kuna-gotovine-11-nekretnina-sedam-vozila-gradevinsko-zemljiste-foto-20190327?utm_source=Linker.hr&utm_medium=widget&utm_campaign=razmjena%2bprometa> accessed 24 April 2020.

Financial investigations *per se* and other connected criminal proceedings such as money laundering (with special emphasis on money laundering via crypto currencies), asset recovery and the EU norms on the control of cash entering or leaving the EU[25] will be one of the priority fields in financial investigation during Croatia's Presidency. Knowledge gained by some Member States and exchanged via Europol might be of essential benefit for EU Member States as a whole, the EPPO and Europol.

Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders[26] aims to make the freezing and confiscation of criminal assets across the EU quicker and simpler. The Regulation[27] is not limited to particularly serious crimes with a cross-border dimension, and non-recognition because of fundamental rights infringements will only be possible in exceptional situations. The executing authority should start conducting the specific measures necessary to execute such orders no later than 48 hours after the decision on the recognition and execution thereof has been taken. This mechanism, together with the full implementation of the EPPO Regulation, may lead to better interconnectivity and provide proper tools in saving the financial interests of the EU. It will also lay a solid foundation for improved international cooperation.

It seems that the work of the EPPO will rely, at least at the very beginning, on the power of national authorities. In data exchange, the EPPO may find a suitable partner in Europol by using its capacities: the SIENA channel for data exchange, analytical support, premises for the organisation of operational meetings, a new innovation environment (Europol as a hub of innovation at the EU level) and available resources (the Europol fund for the implementation of specific criminal financial investigations).

[25] Regulation (EU) 2018/1672 of the European Parliament and the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005 [2018] OJ L284/6.

[26] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1.

[27] For more about provisions of the Regulation, see: https://eucrim.eu/news/regulation-freezing-and-confiscation-orders/.

Sažetak

VANJSKI ODNOSI UREDA EJT-a: IZAZOVI SURADNJE
S HRVATSKOM I EUROPOLOM

U radu se obrađuje primjena Uredbe o europskom javnom tužitelju u kontekstu odnosa prema trenutačnom ustroju, radu, funkcioniranju i mogućnostima koje pruža Europol. U radu se prikazuje i širi kontekst s kojim se cjelokupna zajednica suočava u početku operativne primjene postupanja u skladu s Uredbom o Uredu EJT-a. Pod širim kontekstom podrazumijevaju se načelne aktivnosti koje provodi Hrvatska kao predsjedateljica EU-a u području financijskih istraga, izazovi koji su nastali izlaskom Ujedinjenog Kraljevstva iz EU-a, kao i postupak povodom definiranja višegodišnjega financijskog okvira EU-a za financijsko razdoblje 2021.-2027. Ipak, u radu se u prvom redu razmatra odnos Ureda EJT-a i Europola: kako se i kojim sredstvima može ostvariti kvalitetna, brza i pouzdana razmjena podataka te koje su pravne pretpostavke za uspostavu i realizaciju takve suradnje.

Rad je metodološki određen korištenjem komparativne metode u analizi pravnog okvira za uspostavu Ureda EJT-a te empirijske metode u dijelu koji se odnosi na rad, funkcioniranje i praktične aktivnosti koje poduzima Europol oko prilagodbe za punu primjenu postupanja u skladu s Uredom EJT-a.

U odnosu na moguće izazove autor nudi konkretne prijedloge rješenja. Tako se primjerice u odnosu na razmjenu podataka između dva tijela predlaže korištenje sigurnog Europolova komunikacijskog kanala (SIENA). Nadalje, predlaže se korištenje mogućnosti koje nudi Europol kroz financiranje određenih aktivnosti Europolovim sredstvima, ali se upozorava i na moguće teškoće prilikom analitičke obrade podataka koju provodi Europol. U potonjem slučaju radi se, osim o mogućoj potkapacitiranosti Europola, i o pravnim nedoumicama, za koje autor ponovno nudi rješenje za korekciju kroz novelu odredaba Uredbe o Europolu. U zaključnim razmatranjima autor konstatira kako su pred Uredom EJT-a, Europolom i državama članicama veliki izazovi oko primjene novoga zakonodavstva EU-a usmjerenoga na jačanje suradnje u provedbi financijskih istraga. Kvalitetna obrada podataka moguća je kroz usmjereniju aktivnost svih sudionika, otvaranjem komunikacijskih aktivnosti i sinergijskim analitičkim djelovanjem.

Ključne riječi: Ured EJT-a, Europol, Hrvatska, financijska istraga, SIENA, prijevara u vezi s PDV-om, kriptovaluta